HASHIM ABDUL RAZAK & ORS v. PEMBINAAN PD JAYA SDN BHD (IN LIQUIDATION)

COURT OF APPEAL, PUTRAJAYA
MOHD NAZLAN GHAZALI JCA
ALWI ABDUL WAHAB JCA
SHAHNAZ SULAIMAN JCA
[CIVIL APPEAL NO: N-02(IM)(NCVC)-1761-10-2024]
15 DECEMBER 2025

Abstract – *The liquidation or bankruptcy of a party does not, by itself, render an arbitration agreement 'inoperative' or 'incapable of being performed', under s. 10 of the Arbitration Act 2005. If the underlying dispute concerns pre-insolvency contractual rights, rather than unique insolvency-specific remedies, the arbitration clause remains valid and binding.*

ARBITRATION: *Agreement – Action against party in liquidation – Parties entered into agreement which contained arbitration clause – Allegations that arbitration agreement inoperative or incapable of being performed – Whether liquidation of party rendered arbitration agreement inoperative – Whether dispute regarding pre-insolvency contractual rights remained arbitrable – Whether arbitration survived insolvency – Arbitration Act 2005, ss. 10 & 49*

COMPANY LAW: *Liquidation – Winding up – Parties entered into agreement which contained arbitration clause – Action against party in liquidation – Whether arbitration constitutes 'action or proceeding' – Whether leave of court obtained – Effect on stay of court proceedings – Companies Act 2016, s. 471*

In 2002, the appellants, who were registered landowners, and the respondent, the developer, executed a joint venture agreement ('JVA') to develop the appellants' land to a three-storey shop office. In the JVA, the appellants were to contribute their land and the respondent shall bear the total costs of the development project. However, the JVA was conditional to changing the status of the land from Malay reserve to freehold land. The land was gazetted as freehold and the JVA, thus, became unconditional. Under cl. 4(i) of the JVA, the respondent was obligated to submit layout plans and applications for conversion and subdivision within six months after the agreement became unconditional. Pursuant to cl. 17 of the JVA, should there be a breach of the JVA, the respondent shall return the issue document of title ('IDT') to the appellants without any encumbrances. The respondent did not return the IDT and was then wound up. The appellants filed an action against the respondent to recover the IDT. However, the respondent filed a notice of application, seeking an order that the appellants' claim be stayed

A and referred to arbitration, pursuant to cl. 27 of the JVA ('stay order'). The High Court allowed the respondent's application and the appellants did not file any appeal against the stay order. Furthermore, the appellants did not refer their claim to arbitration for a period of approximately two years and two months. Following the stay order, the appellants then filed a notice of
B application seeking, *inter alia*, an order to set aside the stay order and for the court to allow their claim to proceed in the High Court. The High Court dismissed the stay order. Hence, the present appeal by the appellants. The central issue that arose was whether the High Court erred in law in refusing to set aside the stay order, given the appellants' claim that the underlying
C arbitration agreement was inoperative under s. 10 of the Arbitration Act 2005 ('AA').

Held (dismissing appeal)
Per Shahnaz Sulaiman JCA delivering the judgment of the court:

D **(1)** A fundamental event, such as the liquidation or bankruptcy of a party to the agreement does not render the arbitration agreement inoperative or incapable of being performed. *Vide* cl. 27 of the JVA, the parties signed, fulfilled every requirement of this definition and constituted a valid arbitration agreement within the meaning of the AA. The appellants had not demonstrated that the arbitration agreement had been
E frustrated, discharged by breach, or rendered void by a court order. The proper forum to resolve whether the main JVA was breached and what remedies flowed from that, including the return of the IDT, was the arbitral tribunal, as the parties agreed. (paras 64 & 65)

F **(2)** The respondent was already in liquidation, and the liquidator had been appointed. It did not involve any unique insolvency remedies or the operation of insolvency statutes. Therefore, under the principle articulated in *Larsen Oil And Gas Pte Ltd v. Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore*, the arbitration clause survived, and the mandatory stay of court proceedings under s. 10 of the
G AA was properly granted and upheld. The liquidation of the respondent did not render the arbitration agreement inoperative for this type of claim. Any proceedings against a company in liquidation requires the leave of the High Court under s. 471 of the Companies Act 2016 ('CA'). This requirement was a cornerstone of insolvency law, designed to
H protect the insolvent estate from a multitude of uncoordinated legal actions. An arbitration is an 'action or proceeding' for the purposes of this section. The dispute in the present case squarely related to a breach of rights that arose before the respondent's insolvency and did not involve the operation of the insolvency regime itself. (paras 76-78)

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(3) The appellants' claim was founded on an alleged breach of cl. 4(i) of the JVA, which obligated the respondent to submit layout plans and applications for conversion and subdivision within six months after the agreement became unconditional. This breach occurred long before the respondent was declared insolvent. The appellants' cause of action was therefore rooted in pre-insolvency contractual rights and obligations, specifically the failure to perform under the JVA and the consequent entitlement to the return of the IDT under cl. 17. The nature of the dispute did not engage any of the statutory mechanisms or remedies that were unique to insolvency proceedings. (paras 79 & 80)

(4) As s. 49 of the AA did not apply in the context of a corporate liquidation, the appellants' reliance on it was misplaced. The mandatory stay under s. 10 of the AA was correctly granted and upheld, as the arbitration agreement remained valid, operative and capable of being performed. The appellants were responsible for initiating arbitration once the stay was granted, and their failure to do so, or to seek the requisite leave under s. 471 of the CA to proceed against a company in liquidation, did not invalidate the stay order. The High Court was correct in dismissing the application to set aside the stay order, and no grounds existed to interfere with its exercise of discretion. (para 85)

Case(s) referred to:

FAMG Idaman Resources v. Jasmadu Sdn Bhd [2019] 9 CLJ 763 HC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449 FC ***(refd)***
Larsen Oil And Gas Pte Ltd v. Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore [2011] SGCA 21 ***(refd)***
Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal [2009] 3 CLJ 486 HC ***(refd)***
Peace River Hydro Partners v. Petrowest Corp [2022] 3 SCR 265 ***(refd)***
Peninsula Education (Setia Alam) Sdn Bhd v. Biaxis (M) Sdn Bhd (In Liquidation) [2024] 10 CLJ 216 CA ***(refd)***
V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd [2025] 4 CLJ 282 FC ***(refd)***
Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd [2014] 4 CLJ 895 HC ***(refd)***

Legislation referred to:

Arbitration Act 1952 (repealed), s. 5
Arbitration Act 2005, ss. 4, 8, 9, 10, 18, 49(2)
Companies Act 2016, s. 471
Insolvency Act 1967, ss. 38, 61(f)
Rules of the Court of Appeal 1994, r. 18(1), (2)

Arbitration Act 1950 [UK], s. 3

A *For the appellants - Ramasamy Ellan; M/s Rama & Assocs*
For the respondent - Abdul Halim Lokman; M/s Amir, Halim & Assocs

[Editor's note: Appeal from High Court, Seremban; Suit No: NA-22-NCvC-26-04-2021 (affirmed).]

B *Reported by Lina E*

JUDGMENT

Shahnaz Sulaiman JCA:

Introduction

C **[1]** This appeal arises from the decision of the learned Judicial Commissioner (as he then was) delivered on 6 September 2024 which dismissed the appellants' striking out application in encl. 37.

[2] Having heard comprehensive submissions from all parties and D carefully considered the evidence and the High Court's reasoning, we unanimously dismiss the appeal with costs.

Salient Facts Of The Case

[3] About 23 years ago, on 14 Jan 2002, the appellants (the registered E landowners) and the respondent (the developer), executed a joint venture agreement ("JVA") to develop the appellants' land to a three-storey shop office. In the JVA, the appellants were to contribute their land and the respondent as developer shall bear the total costs of the development project. However, the JVA was conditional to changing the status of the land from F Malay reserve to freehold land. The land was gazetted as freehold on 15 May 2002 and the JVA, thus, became unconditional.

[4] It is the appellants' case that pursuant to cl. 4(i) of the JVA, the respondent shall submit a proposed layout plan for conversion of the agricultural land to a building land and for subdivision to individual sub-lots G within six months from the date of the JVA was unconditional. Pursuant to cl. 17 of the JVA, should there be a breach of the JVA, the respondent shall return the issue document of title ("IDT") to the appellants without any encumbrances. The respondent did not return the IDT and was then wound up on 14 March 2018 pursuant to the filing of winding-up petition dated H 28 December 2017 (See: record of appeal, vol. 2, p. 78).

[5] For clarity, cls. 4(i) and 17 of the JVA are reproduced below:

> 4.(i) Within six (6) months from the date this agreement becomes unconditional, that being, the revocation of the declaration that the owner's Land be a Malays Reservation the Developer shall submit a I proposed layout plan and conversion and subdivision applications for the individual building lots in respect of the said Land to the appropriate authority for approval.

...

17. It is expressly provided that **in the event the Developer shall default in applying for conversion-layout or subdivision of the said Land within six (6) months from the date** this agreement becomes unconditional or the Developer shall unilaterally without just cause and reason abandon this contract at whatever state then in such event the owner shall be entitled to the return of the issue document of title of the owner's Land free from encumbrance.

(emphasis added)

[6] The appellants filed a civil action (Guaman Sivil No: NA- 22NCvC-26-04/2021) against the respondent in April 2021 to recover the IDT due to the respondent's breach of cl. 4(i) of the JVA. However, the respondent filed a notice of application dated 14 December 2021, seeking for an order that the appellants' claim in Suit No: NA-22NCVC-26-04/2021 be stayed and referred to arbitration pursuant to cl. 27 of the JVA. Clause 27 of the JVA is reproduced below:

27. Any dispute or question whatsoever arising between the owner and the Developer touching this agreement or the construction or application thereof any clause or things herein contained or as to any other matter in any way relating to the commercial project or the rights of any party or parties under this agreement **shall be referred to a single Arbitrator** if the parties shall agree upon one otherwise to two Arbitrators one to be appointed by each party to the dispute in accordance with and subject to the provisions of the Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force.

(emphasis added)

[7] On 14 June 2022, the learned High Court Judge allowed the respondent's application ("the stay order"). The appellants did not file any appeal against the stay order. Furthermore, the appellants did not subsequently refer their claim to arbitration for a period of approximately two years and two months.

Proceedings At The High Court

[8] Following up to the stay order dated 14 June 2022, the appellants then filed a notice of application on 7 December 2023 (encl. 37) seeking, *inter alia*, an order to set aside the stay order dated 14 June 2022 and for the court to allow their claim to proceed in the High Court.

[9] The appellants supported their application with several grounds, including:

(i) the arbitration agreement was non-functional and incapable of being performed;

(ii) the respondent was under liquidation;

(iii) the official receiver (as liquidator) was hesitant/unwilling to cooperate in commencing arbitration;

(iv) the appellants were elderly, unwell, and lacked the financial capacity to bear the costs of arbitration; and

(v) nearly 22 years had passed without a resolution.

[10] Leave of the High Court dated 3 May 2024 was granted for a contributory of the respondent, Roselyn Jalong, to oppose the appellants' application on behalf of the respondent company.

[11] The High Court identified and addressed the following key issues arising from the appellants' application:

(i) whether the appellants were barred by the principle of *res judicata* from re-litigating the validity and operability of the arbitration agreement;

(ii) whether the responsibility to refer the claim to arbitration lay with the respondent; and

(iii) whether the appellants' application for the return of the original document of title for the property (GRN 60802 Lot 267) should be granted.

[12] The learned Judicial Commissioner dismissed the appellants' notice of application dated 11 December 2023 on several grounds. On the issue of *res judicata*, the High Court found that the appellants had previously raised the identical argument regarding the arbitration agreement being inoperative in a prior affidavit, and this argument had already been rejected when the stay order was granted on 14 June 2022. Since the appellants failed to appeal that order, they were deemed to have accepted it and were now estopped from challenging the same issue through a "backdoor" application. The High Court applied the principle from *Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal* [2009] 3 CLJ 486; [2008] MLJU 842, which prevents a party from re-raising issues already decided by a court where no appeal was filed. Consequently, the High Court opined there was no valid legal basis to set aside the stay order.

[13] Regarding the responsibility to refer the matter to arbitration, the High Court disagreed with the appellants' argument that this duty fell upon the respondent. It held that the stay order contained no terms or conditions placing this responsibility on the respondent. It simply stayed the court action and referred the claim to arbitration. The obligation to initiate arbitration proceedings, should the appellants wish to pursue their claim, therefore fell upon the appellants themselves in compliance with the order.

[14] Finally, on the issue of the IDT, the High Court found the appellants' application for the IDT's return to be without basis and merit. It ruled that this claim was part of the substantive reliefs sought in the statement of claim, which was covered by the stay order. As such, no adjudication on this substantive issue could be made at this stage, as it had to be resolved through arbitration. Granting this application would, in the High Court's view, render the stay order ineffective and meaningless.

[15] Based on the foregoing analysis and findings, the High Court, on 6 September 2024, decided to dismiss the appellants' notice of application (encl. 37) to set aside the stay order, with no order as to costs.

Submissions Of The Appellants

[16] Aggrieved by the decision of the High Court, the appellants have filed the present appeal. They contended that the learned Judicial Commissioner erred in both law and fact by dismissing their application to set aside the stay order dated 14 June 2022.

The Arbitration Agreement Is "Inoperative" And "Incapable Of Being Performed"

[17] The appellants submitted that the High Court's initial grant of a stay under s. 10 of the Arbitration Act 2005 ("AA 2005") was flawed, as the arbitration clause within the JVA dated 14 January 2002 had become both "inoperative" and "incapable of being performed". The JVA, which was for the development of the appellants' land and is found in bundle C of the records of appeal, was terminated by the appellants on 24 September 2018 following the respondent's breach of cl. 4(i).

[18] This breach, which concerned the submission of necessary plans and applications to the authorities, constituted a discharge by breach. This, the appellants submitted, would render the entire agreement, including its arbitration clause, unenforceable. The appellants rely on authorities such as *Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd* [2014] 4 CLJ 895; [2014] 10 MLJ 633 to assert that a discharged agreement is a recognised ground for being "inoperative". Furthermore, the agreement is "incapable of being performed" due to the respondent's insolvency, which renders it financially unable to undertake a multi-million-ringgit development project, a status the respondent has not rebutted.

The Doctrine Of Res Judicata Is Inapplicable

[19] The appellants argued that the learned Judicial Commissioner misapplied the doctrine of *res judicata*. The stay order of 14 June 2022 was an interlocutory order, not a final decision on the merits, and the core issues were never litigated to finality. The applications in encl. 10 (for a stay) and encl. 37 (to set aside the stay) were distinct, filed by different parties seeking

different reliefs, and therefore do not constitute re-litigation. This position is fortified by the High Court's own acknowledgment in its grounds that no final adjudication on the issues could be made at that stage.

The Prayer For The Return Of The IDT Is Not A Valid Ground For Dismissal

[20] The appellants submitted that the learned Judicial Commissioner erred in using their prayer for the return of the IDT as a ground for dismissing the entire application. Even if this relief was repetitive of their main claim, the learned Judicial Commissioner ought to have exercised his discretion to disregard that specific prayer rather than dismissing the application in its entirety.

On The Application Of s. 49 Of The AA 2005

[21] Lastly, in the appellants' supplementary submission, the appellants submitted on the procedural deadlock created by the respondent company's liquidation. They argued that the Director General of Insolvency ("DGI"), as liquidator, has a statutory duty under s. 49 of the AA 2005, read with ss. 38 and 61(f) of the Insolvency Act 1967, to adopt the arbitration agreement. The DGI's refusal to do so has created an abuse of process.

[22] The High Court has declined jurisdiction due to the stay, while the arbitration cannot proceed without the DGI's participation. This has prejudiced the appellants, causing significant cost and a 23-year delay in resolving a dispute centred on the recovery of a title document.

[23] The appellants challenged the High Court's finding that they were responsible for initiating arbitration. Citing *FAMG Idaman Resources v. Jasmadu Sdn Bhd* [2019] 9 CLJ 763; [2020] 7 MLJ 263, the appellant contended that the burden lies with the party seeking the stay which is the respondent to affirm its readiness and willingness to proceed. Contrary to the court's view, the appellants were proactive, having served the court order on the Insolvency Department pursuant to s. 49 of the AA 2005 to urge the adoption of the arbitration agreement. The Insolvency Department's subsequent inaction should not be held against the appellants.

Submissions Of The Respondent In Reply

[24] The respondent, on the other hand, raised a preliminary objection to contend that the appellants' submissions improperly introduced new grounds of appeal not pleaded in the appellants' memorandum of appeal. Specifically, the arguments concerning which party bears the responsibility to initiate arbitration and the prayer for the return of the IDT are being advanced without the required leave of the court under r. 18(1) and (2) of the Rules of the Court of Appeal 1994. The respondent therefore submitted that these grounds should be struck out or disregarded by this Honourable Court.

On The Responsibility To Refer The Matter To Arbitration

[25] The respondent submitted that the learned Judicial Commissioner was correct in finding the obligation to initiate arbitration lay with the appellants. This finding is consistent with both the explicit terms of the stay order, which stated the claim was "stayed and referred to arbitration", and the arbitration clause (cl. 27) in the JVA, which mandates that "any dispute ... shall be referred to a single arbitrator".

[26] As the claimants under the JVA, it was incumbent upon the appellants to pursue their claim by commencing the arbitral process. The respondent further noted that the appellants' own post-stay order actions to refer the matter at High Court contradict their present argument that the responsibility rested with the respondent.

On The Issue Of The Return Of The IDT

[27] Regarding the appellants' prayer for the return of the IDT, the respondent adopted the High Court's reasoning that this relief constitutes a substantive part of the claim that is subject to the stay order. To grant such relief at an interlocutory stage would effectively nullify the stay order and render it meaningless. The learned Judicial Commissioner was therefore correct to dismiss the application on this point.

On The Applicability Of Res Judicata

[28] The respondent affirmed the High Court's application of the doctrine of *res judicata*. Relying on the authority of *Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal* (*supra*), which the learned Judicial Commissioner cited, the respondent argued that where there is no appeal against a decision, a party cannot be permitted to re-litigate the same issues. This position is fortified by the Court of Appeal's ruling in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1995] 2 MLRA 505, which emphasised that any ruling, whether substantive or procedural, must be adhered to and cannot be arbitrarily re-opened, thereby upholding the judicial pillars of certainty and finality.

[29] The respondent contended these authorities are directly applicable, as the appellants, having chosen not to appeal the original stay order, filed encl. 37 after a lapse of time to set it aside and raising the very same issues previously argued. This is precisely the kind of re-litigation the doctrines are designed to prevent.

On The Separability Of The Arbitration Agreement And Its Operability

[30] The respondent countered the appellants' core argument under s. 10 of the AA 2005 by invoking the crucial distinction between the underlying JVA and the arbitration agreement itself. The respondent relied on the doctrine of separability, codified in s. 18 of the AA 2005, which stipulates

A that an arbitration clause is an independent agreement and that a finding of nullity in the main contract does not *ipso jure* invalidate the arbitration clause. Heavily relying on the Court of Appeal decision in *Peninsula Education (Setia Alam) Sdn Bhd v. Biaxis (M) Sdn Bhd (In Liquidation)* [2024] 10 CLJ 216; [2024] 6 MLRA 160, the respondent argued that an arbitration agreement has
B a life of its own and survives the termination and even the winding-up of the main contract. Consequently, the liquidation of a company does not automatically render the arbitration agreement inoperative or incapable of being performed.

On The Application Of Section 49 Of The Arbitration Act 2005

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[31] The respondent countered the appellants' reliance on s. 49 by arguing that the appellants have failed to follow the correct legal pathway. The respondent contended that if the DGI refuses to adopt the arbitration agreement, the appellants' recourse was to apply to the High Court under s. 49(2) of the AA 2005 and, crucially, to seek the mandatory leave of the
D court under s. 471 of the Companies Act 2016 to proceed against a company in liquidation. By omitting these necessary steps, the appellants cannot now use the DGI's non-adoption as a justification to set aside the stay and revert to the trial court.

E **[32]** The respondent cited supporting authorities to reinforce that this distinct procedure for corporate insolvency must be strictly followed and that the appellants' current approach is legally unsound. The respondent therefore prays for the appellants' arguments on s. 49 of the AA 2005 to be rejected.

Analysis And Findings

F **[33]** This appeal raises, as a central issue, whether the High Court erred in law in refusing to set aside the stay order, given the appellants' claim that the underlying arbitration agreement was inoperative under s. 10 of the AA 2005. The appellants, finding themselves in a procedural quandary where their court action is stayed in favour of arbitration, but the arbitration cannot
G proceed as the respondent's liquidator has not 'adopted' the arbitration agreement, as the appellants now seek intervention by this court.

[34] Their recourse, they submit, is found in s. 49 of the AA 2005. We note that this was not raised in the appellants' memorandum of appeal and we have posed to the parties at the hearing, on the application of s. 49 of the AA
H 2005 in this present appeal. Both parties did not object to the application of s. 49 of the AA 2005 but raised different arguments. It thus falls upon this court to delineate the scope of this provision before delving into the crux of this appeal.

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[35] In our analysis, the issue arising on whether the arbitration is ought to be referred to by the appellants or the respondent is dispositive of this appeal as it will consequentially answer the rest of the grounds raised by the appellant and it would be unnecessary for this court to adjudicate upon the remaining grounds of appeal.

[36] The AA 2005 embodies a legislative policy in favour of arbitration and aiming to minimise judicial intervention in matters governed by an arbitration agreement. This is explicitly provided by s. 8 of the AA 2005, which states that, "no court shall intervene in matters governed by this Act, except where so provided in this Act".

[37] This policy can be seen through the mandatory provisions such as s. 10 of the AA 2005, which obliges a court to stay legal proceedings and refer the parties to arbitration unless the agreement is null and void, inoperative, or incapable of being performed.

[38] Central to this framework is the doctrine of separability, codified in s. 18 of the AA 2005, which establishes that an arbitration clause is an autonomous agreement, independent of the underlying contract. As the Court of Appeal authoritatively held in *Peninsula Education (Setia Alam) Sdn Bhd v. Biaxis (M) Sdn Bhd (In Liquidation)* (*supra*), an arbitration agreement has a life of its own and survives challenges to the main contract, including its termination and even the winding-up of a party. Consequently, the liquidation of the respondent or any dispute regarding the termination of the JVA does not, *ipso jure*, render the arbitration clause inoperative.

[39] We are persuaded by the arguments raised by the respondent and this will be further dealt in turn below. In arriving at our decision, we will first establish the applicable legal framework by examining s. 49 of the AA 2005 and s. 471 of the Companies Act 2016. Following this, we will assess the impact of the mandatory stay under s. 10 of the AA 2005 and the nature of the dispute. Finally, we will consider the arbitrability of post-winding-up claims in light of the competing policies of arbitration and insolvency regimes.

The Applicable Legal Framework On Arbitration Claims Against A Liquidated Company

[40] The specific procedural impasse created by a party's insolvency is addressed in s. 49 of the AA 2005 as raised by the appellants. The precise wording of s. 49 of the AA 2005 is reproduced below:

> 49. (1) Where a person who has been adjudged bankrupt is a party to an arbitration agreement and any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the trustee in bankruptcy or the Director General of Insolvency adopts the arbitration agreement, the agreement shall be enforceable by or against him so far as relates to that matter.

A (2) Where a bankrupt is a party to an arbitration agreement and the trustee in bankruptcy or the Director General of Insolvency does not adopt the agreement, the High Court may, on the application of any party to the agreement, make an order directing that the matter shall be referred to arbitration if the High Court is of the opinion:

B (a) that the matter is one to which the agreement applies; and

(b) that the bankrupt is a party to the agreement which was entered into by him before the commencement of his bankruptcy.

[41] Section 49 of the AA 2005 was emulated from the previous s. 5 of Arbitration Act 1952 that modelled s. 3 of the English Arbitration Act 1950.
C Section 3 of the English Arbitration Act 1950 reads:

3. Bankruptcy.

(1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the trustee in
D bankruptcy adopts the contract, be enforceable by or against him so far as relates to any such differences.

(2) Where a person who has been adjudged bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and any matter to which the agreement applies requires to be
E determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which subsection (1) of this section does not apply, any other party to the agreement or, with the consent of the [creditors' committee established under section 301 of the Insolvency Act 1986], the trustee in bankruptcy, may apply to the court having
F jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and that court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

[42] While this provision has been repealed in England and was not
G re-enacted in their Arbitration Act 1996, it remains a feature of the Malaysian statutory landscape. Consequently, there is a notable dearth of local judicial authority clarifying the procedure for compelling arbitration against a company in liquidation.

H **[43]** A bespoke legal framework to bridge the principle of party autonomy in arbitration with the collective process mandated by insolvency law is captured in this provision. Datuk Professor Sundra Rajoo explains this in his book entitled "*UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018) And The AIAC Arbitration Rules 2018*" at p. 686,
I in these words:

49.1 This section re-enacts section 5 of the AA 1952 and section 3(1) of the English Arbitration Act 1950. Section 5 conferred jurisdiction on the High Court to **order the determination by arbitration of issues relating**

to bankruptcy proceedings where the bankrupt person is a party to the arbitration agreement signed before the commencement of the bankruptcy. It is also material to note that the UNCITRAL Model Law does not contain an equivalent provision to this section 49 of the AA 2005.

49.2 National insolvency legislation and policies typically restrict the contractual freedom of both the debtor and the creditor and alter general principles of contract law to achieve the aims of ensuring equality (or fairness) among creditors by way of transparent process. This means that, despite the freedom of parties to commence court and/or arbitration proceedings, insolvent parties and their creditors are commonly restricted in their ability to commence and continue such legal proceedings, including arbitration.

49.3 The public interest of ensuring a transparent and centralised insolvency procedure is thereby subordinated to the public policy behind arbitration. The public policy behind arbitration is to establish a consensual and decentralised dispute resolution mechanism. The AA 2005 has considered the effect that a party's insolvency may have on the choice of arbitration agreement or a corporate entity in the event of insolvency and winding-up proceedings against the entity.

...

49.5 According to section 49(1) of the AA 2005, in the event a party to an arbitration agreement subsequently becomes bankrupt, and an administrator, or any other person having jurisdiction to administer the property, adopts the arbitration agreement, the arbitration agreement becomes enforceable by or against such a person. Where a bankrupt is a party to an arbitration agreement, the administrator or trustee in the bankruptcy can choose whether or not to adopt such an arbitration agreement.

49.6 However, pursuant to section 49(2) of the AA 2005, the High Court has powers to direct a matter related to the relevant bankruptcy to arbitration where any person having jurisdiction to administer the property does not adopt the arbitration agreement. To do so, the court must consider that such matter is one to which the arbitration agreement applies (section 49(2)(a)). The court must also find that the arbitration agreement was entered by the person adjudged as bankrupt before the commencement of the bankruptcy proceedings (section 49(2)(b)).

49.7 Whether the High Court will grant an application directing the parties to arbitration is at the discretion of the High Court. A direction from the High Court under section 49(2) of the AA 2005 shall be valid only if an application is made by the persons mentioned under section 49(3) of the AA 2005. Such an application seeking a direction from the High Court can only be made either by the other party to the arbitration agreement or by the trustee or any other person having jurisdiction to administer the property of the bankrupt.

(emphasis added)

[44] To recapitulate, s. 49 of the AA 2005 establishes a specific legal framework to address the unique procedural situation that arises when a party to an arbitration agreement is declared bankrupt. Its purpose is to bridge the gap between the principle of party autonomy in arbitration and the collective, orderly process mandated by insolvency law.

[45] A plain reading reveals two potential pathways for a matter to proceed to arbitration post-winding-up under s. 49 of AA 2005:

(i) subsection (1): primarily, the liquidator (trustee in bankruptcy/DGI) has the discretion to "adopt" the arbitration agreement. Upon adoption, the agreement becomes enforceable by or against the liquidator; and

(ii) subsection (2): if the liquidator does not adopt the agreement, the High Court may, on the application by the other party, direct that the matter be referred to arbitration, provided it is satisfied that the dispute falls within the scope of the arbitration agreement and that the agreement was entered into before the commencement of bankruptcy.

[46] The initial stage places the power to proceed with arbitration in the hands of the official overseeing the bankruptcy estate be it the DGI or a trustee in bankruptcy. The provision recognises that the DGI or trustee, who now controls the legal affairs and assets of the bankrupt party, steps into their shoes for this purpose. Consequently, the statute grants the DGI a discretionary right to "adopt" the arbitration agreement.

[47] The act of "adoption" is a formal decision by the DGI to be bound by the pre-existing agreement. It is an elective step whereby the DGI can choose whether or not to take it based on what is most beneficial for the DGI of the bankrupt estate. If the DGI decides to adopt the agreement, it is as if they themselves had originally been a party to it. This makes the arbitration agreement legally enforceable both by them and against them.

[48] However, it is an explicit distinction of the wording of s. 49 of the AA 2005 that this recourse is only in respect to a bankrupt individual. This may differ in the context of post-winding-up of a company that is housed in s. 471 of the Companies Act 2016 that states:

> Action or proceeding stayed after winding up order
>
> 471.(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.
>
> (2) The application for leave under subsection (1) shall be made in the Court granting the winding up order and shall be served on the liquidator.

(3) The office copy of the order for leave under subsection (1) shall be lodged by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

[49] Guidance on this matter is found in the *International Comparative Legal Guide Q&A Chapter 27*, which was brought to the court's attention by the respondent. The guide elucidates the correct procedure where a bankrupt under sub-s. 49(2) of the AA 2005 *vis-à-vis* a liquidated company under s. 417 of the Companies Act 2016 may apply for leave to the court as follows:

Where DGI does not adopt the arbitration agreement, a claimant may apply to the High Court under Section 49(2) of the Act (referring to the Arbitration Act) to enforce the agreement for a reference to arbitration. At the same time, leave of the High Court under Section 8(1) of IA (the Insolvency Act) to commence the arbitration [is] required.

[50] Crucially, in the context of a corporate entity in liquidation s. 471 of the Companies Act 2016 steps in to commence arbitration proceeding involving a liquidated company. The same legal guide further clarifies:

As for corporate insolvency, leave of the High Court under section 471 of the Companies Act 2016 is required to proceed with or commence an arbitration when a corporate respondent has been wound up, or when an interim liquidator has been appointed.

[51] Given that the respondent is a private limited company in liquidation, the appellants were obligated to seek leave from the High Court under s. 471 of the Companies Act 2016 to proceed with or commence arbitration against the respondent.

[52] The necessity of this procedure was affirmed in the case of *Peninsula Education (Setia Alam) Sdn Bhd* (*supra*), where the court observed:

[63] *What has changed is that, leave of the Court would be required for the Employer to proceed with a counterclaim against its Contractor*. In *UDA Land Sdn Bhd v. Puncak Sepakat Sdn Bhd* [2021] 1 MLRH 370 ("UDA Land") it was observed in para [20] that the *"... Plaintiff obtained leave from the winding up court to counterclaim against the Defendant in the arbitration proceedings*", presumably under the then s. 226(3) Companies Act 1965. The equivalent provision under s. 471(1) and (2) Companies Act 2016 is as follows ...
(emphasis added)

[53] The distinction between proceedings against a wound-up company and proceedings by a wound-up company was authoritatively delineated by the Federal Court in *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449; [2020] 5 MLRA 1:

[20] Similarly, if a company is wound up by an order of court, the board of directors becomes *functus officio*. *The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or*

A *defend any action or other legal proceedings in the name and on behalf of the company.* A creditor or contributory cannot commence or continue with any action in the name of the wound up company. *Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound*
B *up company's action is dismissed, the liquidators usually imposes conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given*.

[21] At the outset, it is important to appreciate that there are two different and distinct fact situations under which leave of the court or sanction of
C the liquidator is required. *The first is in respect of action or proceeding against a wound up company. This situation is governed by s. 226(3) of the 1965 Act/s 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound up company. The second scenario is where action or proceeding is taken by a wound up company: s. 236(2)(a) and (3) of the 1965 Act/s 486 of the 2016 Act read*
D *together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained*. The factual matrix in this appeal falls under the latter scenario.

(emphasis added)

[54] A plain textual analysis of s. 49 of the AA 2005, however, reveals a
E crucial limitation: its provisions are expressly and exclusively framed in terms of "a person who has been adjudged bankrupt". The statutory language provides no basis for its direct application to a corporate entity in liquidation under the Companies Act 2016. The respondent is a wound up company and not a bankrupt individual. Therefore, s. 49 of the AA 2005, on its own, does
F not govern the procedural impasse created by the liquidation of the respondent company.

[55] Consequently, the appellants' attempt to anchor their case in s. 49 of the AA 2005 is fundamentally misdirected. The prerequisite leave must be sought under the applicable corporate insolvency regime. In the appellants'
G application to set aside the stay order, leave was granted by the High Court on 3 May 2024 for a contributory of the respondent company to file an affidavit to oppose the application by virtue of the Companies Act 2016. Thus, the appellants cannot now rely on s. 49 of the AA 2025 to impose a duty on the DGI to adopt the arbitration agreement.

H *The Stay Application Under s. 10 Of The AA 2005*

[56] Having determined that s. 49 of the AA 2005 does not provide a direct procedural remedy in the context of corporate liquidation, we now turn to the question of whether the learned Judicial Commissioner was correct in
I refusing to set aside the stay order pursuant to the appellants' challenge under s. 10 of the AA 2005 despite the appellants claim that the agreement is inoperative. The mandatory wording of s. 10 of the AA 2005 imposes the

court to stay proceedings brought before the parties to an arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Section 10 of the AA 2005 provides:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

[57] The respondent contended that the application of s. 10 of the AA 2005 is invoked specifically by the existence of an arbitration agreement, and not by the underlying JVA in its entirety. The definition of an "arbitration agreement" is precisely provided for under s. 9 of the AA 2005:

> Definition and form of arbitration agreement
>
> 9. (1) In this Act, *'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*.
>
> (2) An arbitration agreement may be in the form of an *arbitration clause in an agreement* or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in-
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (5) The reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.
>
> (emphasis added)

[58] The cornerstone of the respondent's position is the doctrine of separability, which is codified in s. 18 of the AA 2005 as reproduced below:

> Competence of arbitral tribunal to rule on its jurisdiction
>
> 18. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

A (2) For the purposes of subsection (1):

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

B (b) a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

[59] We agree with the respondent that this statutory provision makes it unequivocally clear that an arbitration clause is an autonomous agreement, separate from the substantive terms of the main contract in which it is C housed. The fate of the main agreement does not, *ipso jure*, determine the fate of the arbitration agreement.

[60] The authority of *Peninsula Education (Setia Alam) Sdn Bhd* (*supra*) as correctly pointed out by the respondent is directly on point and fortifies this position. The Court of Appeal in that case held, *inter alia*:

D [39] In *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633, Mary Lim J. (later FCJ) held that for an arbitration agreement to be inoperative or incapable of being performed, those constraints must relate to the arbitration agreement itself. Her Ladyship made reference to the British Columbia Court of Appeal's decision in *Prince George (City) v. Mcelhanney Engineering Services Ltd* [1995] CLJ No. E 1474 which again cited MJ Mustill & SC Boyd, *The Law and Practice of Commercial Arbitration in England*, Second Edition, London, Butterworths, (1989) at pages 464-465 where the learned authors said:

> The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, F although not void *ab initio*, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be "inoperative". First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise. Second, as G is discussed in Chapter 32, there may be circumstances in which an arbitration agreement might become "inoperative" by virtue of common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties. But the fact that issues in the arbitration overlap issues in proceedings between H parties who are not bound by the arbitration agreement does not make the agreement "inoperative".

[40] *We are not prepared in the circumstances of this case to say that the arbitration agreement has become "inoperative" upon the Contractor going into liquidation on ground that the fees for arbitration would be beyond the reach of the Contractor in* I *liquidation or that there would be unnecessary delay caused by the matter going forward to arbitration*. With the bottleneck of cases traceable to the

pandemic days, proceedings in the Courts are not necessarily faster than in arbitration. Whilst arbitral awards are final (save for the limited grounds for setting aside) judgments of the Court are subject to often a few tiers of appeal.

(emphasis added)

[61] The mandatory language of s. 10 of the AA 2005 is such that the court could not disregard the terms of the arbitration agreement just because one of the parties thereto was in liquidation. The fact that the debt was not admitted was sufficient for it to come within the meaning of a 'matter which is the subject of an arbitration agreement' in s. 10 of the AA 2005, for reference to arbitration. The principle of the court granting a stay of proceedings in favour of arbitration applied equally across the board even when a claimant was already in liquidation and was claiming a disputed debt in litigation and not arbitration. The respondent's liquidation would not change an iota of its initial agreement to arbitrate. This was again mentioned in *Peninsula Education (Setia Alam) Sdn Bhd* (*supra*) at paras. [48] and [62] as follows:

[48] It is thus not a question of whether because of the liquidation of a party to an arbitration agreement, a new paradigm has set in to render "inoperative" the arbitration agreement. *The mandatory language of our s. 10 AA 2005 is such that the Court cannot disregard the terms of the arbitration agreement just because one of the parties to it is in liquidation. The fact that the debt is not admitted is sufficient for it to come within the meaning of a "matter which is the subject of an arbitration agreement" for reference to arbitration.*

...

[61] We are fully conscious of the fact that in the present case the Contractor is already in liquidation and not a case where it is seeking to wind up the Employer for what it perceives to be a debt not disputed on substantial ground for work done. However, *the principle of the Court granting a stay of its proceedings in favour of arbitration applies equally across the board even when the claimant is already in liquidation and is claiming a disputed debt in litigation and not arbitration. Its liquidation has not changed an iota its initial agreement to arbitrate.*

(emphasis added)

[62] The doctrine of separability, as enshrined in s. 18 of the AA 2005, ensures that the arbitration agreement possesses an independent and resilient life of its own. As the Court of Appeal in the above case explicitly stated at para. 20:

Under the doctrine of separability governing arbitration agreements, the arbitration agreement has a life of its own and survives the challenges made to the contract on the grounds of fraud, duress and even illegality, unless the matter is not arbitrable on the ground of public policy of the

A State. *Therefore, even though a winding-up of a company has the effect of terminating agreements which the liquidator may not want to affirm and continue with, the arbitration agreement would survive such a termination*. (para 20)
(emphasis added)

[63] We also make reference to the case of *Peace River Hydro Partners* B *v. Petrowest Corp* [2022] 3 SCR 265, that was decided in the Supreme Court of Canada which was referred to in *Peninsula Education* case (*supra*) propounded this position as follows:

[8] **To be clear, the fact that a party has entered receivership or insolvency proceedings or is financially impecunious is not, on its own, a sufficient** C **basis for a court to find an arbitration agreement inoperative**. The party seeking to avoid arbitration must establish, on a balance of probabilities, that a stay in favour of arbitration would compromise the integrity of the parallel insolvency proceedings. The following non-exhaustive list of factors, discussed further below, may assist in the court's analysis: (a) the effect of arbitration on the integrity of the insolvency proceedings, which D are intended to minimise economic prejudice to creditors; (b) the relative prejudice to the parties to the arbitration agreement and the debtor's stake-holders; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings, if applicable; and (e) any other factors the court considers material in the circumstances.
E
(emphasis added)

[64] Applying the reasoning from *Peninsula Education (Setia Alam) Sdn Bhd* (*supra*), it is clear that at the outset, even a fundamental event such as the liquidation or bankruptcy of a party to the agreement does not render the arbitration agreement inoperative or incapable of being performed. It is F evident that cl. 27 of the JVA, that the parties signed, fulfils every requirement of this definition and constitutes a valid arbitration agreement within the meaning of the AA 2005.

[65] Under the doctrine of separability, the arbitration agreement survives these challenges. The appellants have not demonstrated that the arbitration G agreement itself has been frustrated, discharged by breach, or rendered void by a court order. The alleged "incapability of performance" stems from the respondent's financial status and the liquidator's inaction, which, as held in *Peninsula Education (Setia Alam) Sdn Bhd* (*supra*), are insufficient to override the mandatory stay under s. 10. The proper forum to resolve whether the H main JVA was breached and what remedies flow from that, including the return of the IDT, is the arbitral tribunal, as the parties agreed.

Arbitrability Of Post Winding Up Petitions By The Nature Of The Claim

[66] While the foregoing analysis establishes the robust independence and I continued enforceability of arbitration agreements, the legal landscape becomes more nuanced when such agreements intersect with a wound up

corporate entity. This is especially so when s. 4 of the AA 2005 provides that an arbitration agreement may not be arbitrable should it be contrary to public policy. Section 4 of the AA reads as follows:

> Arbitrability of subject matter
>
> 4. (1) Any dispute which the parties have agreed to submit toarbitration under an arbitration agreement may be determined by arbitration *unless the arbitration agreement is contrary to public policy or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia*.
>
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.
>
> (emphasis added)

[67] This necessitates a separate examination of the arbitrability of post-winding-up disputes and the procedural safeguards built into insolvency legislation. The following section therefore addresses the specific legal regime governing proceedings against a wound up company.

[68] We note of the more recent Federal Court case in *V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd* [2025] 4 CLJ 282; [2025] 2 MLJ 744, that despite the mandatory stay in s. 10 of the AA 2005, a creditor's winding-up petition does not automatically trigger a mandatory stay under arbitration legislation. It was held that winding-up is a collective, statutory process for the benefit of all creditors (public policy), while arbitration is a private, consensual process between parties. The Federal Court clarified as reproduced below:

> [159] In its reasoning, Sian held that a creditor's winding up petition does not trigger the mandatory stay provided for under the arbitration legislation. This is because firstly, **the stay provisions did not extend to winding up proceedings**. Secondly, **a winding up petition is not a claim of the type caught by those provisions**. The petition does not seek to resolve nor determine the petitioner's claim to be owed money by the company. In short, the existence or otherwise of the debt underpinning the petition did not fall for determination in such winding up proceedings.
>
> (emphasis added)

[69] In this vein, the case of *V Medical Services Sdn Bhd* (*supra*) has adopted the higher threshold to determine the arbitrability of the dispute by the genuinely disputed on substantial ground test to stay a winding-up petition. The legislative intent of the two regimes should not be conflated. The Federal Court held as follows:

> [162] As we stated at the outset, we decided to follow the decision in Sian as its approach appeared to clarify the law while giving independent consideration to both arbitration and insolvency. Significantly the adoption of the conventionally utilised test in insolvency proceedings,

A namely that **it is only upon establishing that a debt is genuinely disputed on substantial grounds that a winding up petition will be stayed**, even where there is an arbitration agreement, appears to give effect to the purpose and object of the insolvency provisions under the CA. It also does not offend the grant of a mandatory stay to ensure that parties do not seek to resile from their obligation to arbitrate pursuant to an
B arbitration agreement.

(emphasis added)

[70] The Singaporean authority of *Larsen Oil And Gas Pte Ltd v. Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore* [2011] SGCA 21 provides an analytical framework for reconciling the often-competing
C domains of arbitration and insolvency law. In this case, the Singaporean Court of Appeal was faced with the issue of whether the respondent's claim against the appellant fell within the scope of the arbitration clause and whether the court's discretion was dependent on the arbitrability of the dispute and whether the claims against the appellant were arbitrable. In this
D case, the respondent was placed in liquidation in Cayman Islands and subsequently compulsory liquidation order was made by the Singapore High Court. Later, the liquidators were appointed and were exercising their statutory powers to recover assets for the benefit of creditors. This is an insolvency-specific remedies that arises upon the company's liquidation.

E **[71]** The Singapore Court of Appeal articulated the fundamental tension at play: arbitration is founded on the principle of party autonomy and the decentralised, private resolution of disputes, while insolvency proceedings are a collective, public statutory mechanism designed to ensure the orderly and fair administration of an insolvent estate for the benefit of all creditors.

F **[72]** To navigate this interface, the Singaporean Court in *Larsen Oil And Gas Pte Ltd* (*supra*) established a critical distinction based on the nature of the dispute. On one hand, disputes that arise directly from the operation of the insolvency regime itself, those that commence only upon the onset of formal insolvency proceedings, like avoidance actions taken by the liquidators, are
G deemed non-arbitrable as a matter of public policy.

[73] On the other hand, disputes concerning the company's pre-insolvency rights and obligations, such as disputes that occurred before insolvency, may be arbitrable. In essence, *Larsen Oil And Gas Pte Ltd* (*supra*) affirms that at the
H onset of insolvency, the court must carefully weigh the interests of the general body of creditors, which becomes a paramount public policy consideration.

[74] As referred by the Federal Court in the above case, the Singaporean Court of Appeal in *Larsen Oil And Gas Pte Ltd* (*supra*) held as follows:

I [96] Earlier in 2011 in *Larsen Oil And Gas Pte Ltd v. Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore* [2011] SGCA 21 ('*Larsen*') the Singapore Court of Appeal considered whether Petropod's, claims against Larsen fell within the scope of the arbitration clause and

whether the court's discretion was dependent on the arbitrability of the dispute and whether its claims against Larsen were arbitrable. While not on all fours with the issue before us, as the creditor company was in liquidation and as the primary issue related to arbitrability, it is relevant in that it underscores the rationale underlying the treatment of arbitration clauses in an insolvency regime:

> [1] Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, the arbitration embodies the principles of party autonomy and decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The appeal before us raised an interesting and novel point of law relating to the interfacing these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process?

[97] At para 45 of the judgment the Singapore Court of Appeal drew a distinction between "*disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of the insolvency regime*:

> [46] We, therefore are of the opinion that *the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard*. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.
>
> [47] On the other hand, *different considerations apply in relation to disputes involving an insolvent company that stem from its pre-insolvency rights and obligations. These disputes are binding on liquidators who, although not parties to such agreements, have stepped into the shoes of the company liquidation. Such disputes differ from those arising on the onset of insolvency because they do not involve public policy considerations such as the protection of creditors*. Nonetheless, there are other policy issues that may militate against giving effect to them.

[98] Those other policy issues which are outlined in para. 48 include ensuring parties' fundamental rights of access to the courts, which might be lost if parties are compelled to arbitrate. Secondly, the recognition that the creditors of the insolvent company are the parties with the real interest in any dispute that involves the insolvent company, since they are the ones who stand to lose or gain from any diminution or augmentation of the company's assets. As these creditors are non-parties to the arbitration agreement between the liquidator and the arbitral counterparty, it was difficult to justify why the liquidator should be compelled to give up its

A rights to judicial remedies in favour of arbitration. In short, the Singapore Court of Appeal recognised that *disputes arising at the onset of insolvency required the court to take into consideration the interests and protection of creditors by way of public policy*.

(emphasis added)

B **[75]** It is at this juncture, we acknowledge that the dispute involved in *V Medical Services* (*supra*) was at the pre-winding-up stage and pertaining to winding-up petition. This is where a creditor seeks to initiate winding-up proceedings based on a disputed debt. The Federal Court there was tasked with balancing the arbitration agreement against the creditor's statutory right C to petition and applied the higher threshold test of a 'genuine and substantial dispute' under the Companies Act 2016.

[76] The present appeal, in contrast, arises at the post-liquidation stage. The respondent company is already in liquidation, and the liquidator has been appointed. It does not involve any unique insolvency remedies or the D operation of insolvency statutes. Therefore, under the principle articulated in *Larsen Oil And Gas Pte Ltd* (*supra*), the arbitration clause survives, and the mandatory stay of court proceedings under s. 10 of the Arbitration Act 2005 was properly granted and upheld. The liquidation of the respondent does not render the arbitration agreement inoperative for this type of claim.

E **[77]** Any proceeding against a company in liquidation requires the leave of the High Court under s. 471 of the Companies Act 2016. This requirement is a cornerstone of insolvency law, designed to protect the insolvent estate from a multitude of uncoordinated legal actions. An arbitration is an "action or proceeding" for the purposes of this section.

F **[78]** The dispute in the present case squarely relates to a breach of rights that arose before the respondent's insolvency and does not involve the operation of the insolvency regime itself.

[79] The appellants' claim is founded on an alleged breach of cl. 4(i) of the G JVA dated 14 January 2002, which obligated the respondent to submit layout plans and applications for conversion and subdivision within six months after the agreement became unconditional. This breach occurred long before the respondent was declared insolvent on 18 March 2018. The appellants' cause of action is therefore rooted in pre-insolvency contractual rights and obligations, specifically the failure to perform under the JVA and the H consequent entitlement to the return of the IDT under cl. 17.

[80] The nature of the dispute does not engage any of the statutory mechanisms or remedies that are unique to insolvency proceedings. It is not a claim brought by a liquidator to avoid transactions, challenge preferences, or recover assets for the benefit of creditors under insolvency legislation. I

Rather, it is a private contractual claim for specific performance and return of a title document, which arose from the respondent's pre-liquidation conduct. As such, it falls within the category of disputes that "stem from the company's pre-insolvency rights and obligations", as described in *Larsen Oil And Gas Pte Ltd v. Petropod Ltd* (*supra*).

[81] The arbitration agreement (cl. 27 of the JVA) was entered into before the onset of insolvency and governs disputes "touching this agreement or the construction or application thereof". The subject matter of the dispute, whether the respondent breached the JVA and whether the appellants are entitled to the return of the IDT, is purely contractual and does not depend on the insolvency regime for its resolution. The insolvency of the respondent is a procedural circumstance that affects the enforcement of the arbitration agreement, but it does not transform the substantive dispute into one arising from the operation of insolvency law.

[82] We are of the view that the procedural deadlock caused by the DGI's non-adoption of the arbitration agreement, as raised by the appellants, does not alter the fundamental character of the underlying dispute as one arising from pre-insolvency rights and obligations.

[83] The appellants' argument that the underlying JVA termination or the respondent's insolvency renders the arbitration agreement "inoperative" is unsustainable in light of s. 18 of the AA 2005. This section codifies the doctrine of separability, establishing that an arbitration clause is treated as an agreement independent of the other terms of the contract.

[84] As held in *Peninsula Education (Setia Alam) Sdn Bhd v. Biaxis (M) Sdn Bhd (In Liquidation)* (*supra*), an arbitration agreement has a life of its own and survives the winding-up and termination of the main contract. The liquidation of a company does not, *ipso facto*, invalidate the arbitration clause. The disputes between the parties, including whether the main contract was validly terminated and what reliefs flow from that, are precisely the kinds of disputes the independent arbitration agreement is meant to govern.

Conclusion

[85] Given our conclusive finding that s. 49 of the AA 2005 does not apply in the context of a corporate liquidation, the appellants' reliance on it is misplaced. The mandatory stay under s. 10 of the AA 2005 was correctly granted and upheld, as the arbitration agreement remains valid, operative and capable of being performed. The doctrine of separability, affirmed in *Peninsula Education (Setia Alam) Sdn Bhd v. Biaxis (M) Sdn Bhd (In Liquidation)* (*supra*), ensures the arbitration clause survives irrespective of the termination of the main joint venture agreement or the respondent's liquidation. The dispute, which concerns pre-insolvency contractual rights and obligations as set out in *Larsen Oil And Gas Pte Ltd v. Petropod Ltd* (*supra*); *V Medical Services*

A *Sdn Bhd v. Swissray Asia Ltd* (*supra*), is arbitrable. Accordingly, it is unnecessary to adjudicate in depth upon the appellants' remaining grounds, which we find to be without merit. The learned Judicial Commissioner was correct in his application of the law and in dismissing the application to set aside the stay order.

B **[86]** In summary, this court finds that:

(i) section 49 of the AA 2005 has no application to a company in liquidation; the proper framework is governed by s. 10 of the AA 2005 and the mandatory stay regime;

C (ii) the arbitration agreement is neither inoperative nor incapable of being performed merely due to the respondent's liquidation;

(iii) the dispute is arbitrable as it involves pre-insolvency contractual rights, consistent with the principles in *Larsen*, *V Medical Services* and *Peninsula Education*;

D

(iv) the appellants were responsible for initiating arbitration once the stay was granted, and their failure to do so, or to seek the requisite leave under s. 471 of the Companies Act 2016 to proceed against a company in liquidation, does not invalidate the stay order; and

E (v) the High Court was correct in dismissing the application to set aside the stay order, and no grounds exist to interfere with its exercise of discretion.

[87] For the reasons elaborated above, and for the additional comprehensive reasons provided by the learned Judicial Commissioner F which this court endorses, this appeal is unanimously dismissed. The decision of the learned Judicial Commissioner is affirmed. Costs of RM10,000 to be paid to the respondent subject to allocator.

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